

City of Detroit

CITY COUNCIL

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TO: The Honorable Detroit City Council

FROM: David Whitaker *[Signature]*
Pamela Osborne *[Signature]*
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Lewis Smith *[Signature]*

DATE: March 17, 2006

RE: ANALYSIS OF THE DETROIT/WAYNE PORT AUTHORITY
MASTER CONCESSION AGREEMENT

Your Honorable Body asked the Research and Analysis Division (RAD) to review and analyze the Master Concession Agreement (Agreement) by and between the Detroit/Wayne County Port Authority and the Ambassador Port Company

The Detroit/Wayne County Port Authority is a public corporation as created pursuant to the 1978 PA 639, entitled "Hertel-Law-T. Stopczynski port authority act." Its five-member governing board is appointed as follows: one by the governor and two each by the City and County. Other entities involved in the Agreement are the Ambassador Port Company and the Nicholson Terminal and Port Company.¹

¹ Per the Seaports Press Review dated June 3, 2005, the Ambassador Port Company, a private corporation, is a subsidiary of the Central Transport. Central Transport offers direct service to 98% of major manufacturing and retail markets across North America. The Nicholson Terminal and Port Company is a private corporation will handle stevedoring and all dockside functions, with a history of handling port cargoes for over seventy years in the Metropolitan Detroit area. Curtis Hertel, Executive Director of the Detroit/Wayne County Port Authority said "This will be the first time in southeast Michigan that we'll be able to bring waterborne cargo, rail and trucks all together."

Legal issues, theories and analysis are largely determined by the facts. In this instance, not all of the facts and relevant documents are known and/or in RAD's possession. As new facts are revealed and additional documents are received, this could alter the analysis of the matter. First and foremost, RAD does not have a copy of several documents referenced in the Master Concession Agreement (Agreement). Those include 1. The "Remainder Agreement" allegedly signed between the City and the Ambassador Port Company, and 2. The "Development Plan" allegedly approved by the applicable governing bodies (including the City.) Those are critical documents needed to complete this legal analysis, as they could show to what extent the City authorized the Authority to enter into the Master Concession Agreement. Secondly, RAD only has an unsigned, undated Master Concession Agreement. Thirdly, RAD is not in possession of potentially other relevant documents, such as any agreement between the Authority and Nicholson Dock and Port Company.

Of special note, even though the copy of the Agreement is marked "confidential" on every page, it may not be a confidential document, especially if it is the official document acted upon and signed by the Detroit/Wayne County Port Authority Board of Directors as asserted by them. That transaction also would have had to happen in an open meeting pursuant to the Open Meetings Act, and would also be available through the Freedom of Information Act. This is significant, as it gives the opportunity for the public to review it and preserve and exercise their rights within any statutory time limitations.

RAD also looked at the above in the context of a recent resolution approved by Your Honorable Body on May 6, 2005, which assigned certain property rights subject to certain condition^s, which is attached.

The salient components of the Master Concession Agreement are:

1. The Authority grants a concession to Ambassador Port Company (Concessionaire) in the Premises and Facility.
 2. The Master Concessionaire is the Ambassador Port Company.
 3. The Authority is now the owner of 3.6425 acres at 4461 W. Jefferson Ave. and 31.31 acres at 4300, 4461 and 4500 W. Jefferson.
 4. The City retains a "deed for a remainder interest" in the Premises that will vest under certain limited conditions.
 5. In order for the Concession to be profitable to the Master Concessionaire, future expansion of the Facility outside of the Premises will be necessary.
 6. The expansions of properties are expected to be achieved by the Concessionaire loaning money to the Authority and the Authority issuing tax-exempt bonds.
 7. Currently the Premises are tax-exempt.
 8. In order to have financial success, the parties depend on continued tax-exempt status.
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9. The Authority issued a Promissory Note for \$2,078,748.70 to the Concessionaire
10. The "Remainder Agreement" entered into between the City and Concessionaire, would honor this Agreement and Promissory Note in case the Authority defaults.
11. Sec. 1 Definitions, "Concession" is defined as "the exclusive right to operate and manage the Facility and to perform the Facility Work on the Authority's behalf." Emphasis added.)
12. Sec. 2.1 Administration and Operation, "Facility Work" includes (partial list):
 - a. Recommend for Authority approval, a "Master Plan" for the development, construction, expansion, contraction, operation, maintenance and improvements to the Facility, including budgets and architectural drawings
 - b. Negotiate contracts for materials, property sale or acquisition, borrowing
 - c. Present a proposed operating budget to Authority
 - d. Recommend, at any time, pricing of products, services and other activities occurring at the Facility
 - e. Recommend, at any time, operational polities such as hours of operation, scope of services and rules for users of the Facility
 - f. Present amendments to the Master Plan, Pricing Schedule, the Budget and Operating Procedures, as the Concessionaire determines necessary
 - g. Manage all processes associated with modifying, developing, expanding, constructing, rehabilitating, improving, subleasing, maintaining, repairing or otherwise managing the physical condition of the Facility
 - h. Operate and manage all aspects of the Facility
 - i. Execute contracts as an independent contractor for services from the Facility Operator
 - j. Procuring and maintaining permits, licenses, and approvals for operation of and modification to the Facility.
13. "Floating Rate" is established, but can under certain conditions be determined by the Master Concessionaire.
14. "Gross Receipts" has many exceptions and conditions before being considered gross receipts, including but not limited excluding Capital Receipts.
15. "Refunding Amounts" means amounts payable by Facility Operator (Nicholson Dock and Port Company) to the Master Concessionaire. Such amounts include paying the Concessionaire a percentage of amounts generated by the Nicholson Dock and Port Company from the stevedoring operation at the port facility located south of the Premises (Ecorse Port).
16. Sec. 2.1 *Grant of Concession and Facility Work*. The Concessionaire can choose if it wants to do the Concession in exchange for the Concession and Concession Payment. The Concessionaire will perform the Facility Work (see list under item 12 above.)
17. Sec. 2.2 The Concessionaire shall use reasonable business judgment to maximize Concession Payments. This includes authorizing "the Facility Operator to perform Facility Work in a manner divergent from the Budget, the Master Plan, the Price Schedule or the Operating Procedures..."

18. Sec. 2.3 *The Authority's Oversight and Cooperation.* The Authority shall agree to the following:
- (a) "The Authority shall not unreasonably withhold the Authority's consent to any Budget, Master Plan, Price Schedule, Operating Procedures or other proposals or requests of the Concessionaire..."
 - (b) The Authority shall respond to all requests for approval within 30 days. Failure to deny request for approval within 30 days shall be deemed consent.
 - (c) The Authority shall execute such documents and grant approvals through third party performing acts on behalf of the Authority, as the Concessionaire reasonably requests.
 - (d) The Authority shall inform the Concessionaire of all potential defaults, breaches or threats, which will allow the Concessionaire to take any action on behalf of and at the expense of the Authority to sustain current or future leases, permits or easements
 - (e) The Authority shall not pledge, sell, assign, let, lien, option without the Ambassador Port Company's prior consent.
 - (f) If, for any reason, the Authority refuses to approve modifications to the Master Plan, Budget, the Pricing Schedule or the Operating Procedures, the foregoing shall continue in effect unmodified and renewed for the next year.
 - (g) If any state, federal, or local government agency issues any notices of violation or non-compliance or withdrawal or cessation, or any other citations to the Facility, the Authority shall immediately notify the Concessionaire and follow with written notification within 2 business days.
 - (h) The parties acknowledge that the Premises provided by the Authority is exempt from real estate taxes and that neither the Authority nor Concessionaire shall be responsible for the payment of any real estate, personal property, user or operations taxes.
 - (i) The Authority shall maintain an office on the Premises or Expansion Properties. The Authority's office shall not interfere with the Facility Work and the Concession. All expenses related to the operation of the Authority's office shall be borne by the Authority.
19. Sec. 2.4 *Employment of Facility Operator.* The Concessionaire shall be entitled to replace Nicholson Terminal and Dock Company.
20. Sec. 2.5 *Waiver of Conflict* which reads in its entirety:

The Authority understands and acknowledges that Master Concessionaire or its affiliates owns real property in and around the Premises that Master Concessionaire is interested in incorporating into the operations of the Facility and has agreed to perform the Facilities Work in part for the purpose of maximizing the value of such other properties and the profits to current and future businesses operating thereon. Preference shown to such other properties owned by Master Concessionaire or its affiliates over the Facility

shall not constitute a breach of any duty of Master Concessionaire hereunder or a breach of the Facility Operation Standard. The Authority, hereby waives any claim for breach of fiduciary duty or other cause of action in connection with any actions taken by Master Concessionaire or any Facility Operator whereby other property owned or controlled by them receives disproportionate benefit to the Facility. (Emphasis added.)

21. Sec. 4.1 *Construction and Improvements*. The Concessionaire may construct, demolish and maintain any facilities, improvements, and building on the Premises.
22. Sec. 4.3 *The Authority Funding for Construction or Improvements*. Upon request of the Concessionaire, the Authority shall use its bonding authority to approve the issuance of bonds.
23. Sec. 4.4 *Master Concessionaire Funding for Construction of Improvements*. The Concessionaire may use its own funds to construct Facility or Premises, which shall be deemed advances of the principal under the Promissory Note and added to the outstanding principal balance of the Promissory Note.
24. Sec. 4.5 *Authority Title Retention*. Whatever the Concessionaire builds or improves using Authority bonds, said real property shall be owned by the Authority.
25. Sec. 6.4 *Warranty re: Master Plan* The Authority represents and warrants its Development Plan was duly adopted and approved by all applicable governmental authorities after notice and hearing in accordance with MCL Sec. 120.123 of the Port Authority Act. (That section, 23, requires the approval of the City of Detroit, Wayne County and the State of Michigan. RAD is not in possession of the plan as of the date of this memo, to verify if such a plan was approved and what it said.)
26. Sec. 7 *Term and Termination of Operating Agreement*. The Agreement shall be in effect for the Concession Term, which is from the effective date of the Agreement through March 31, 2030, subject to three successive 25-year extension options at the election of the Concessionaire.
27. Sec. 8.3 *Right of Master Concessionaire to Purchase*. If insurance is not maintained by Master Concessionaire or the Facility Operator, such failure shall not constitute an independent cause of action and shall not result in liability of Master Concessionaire to the Authority or any other party for uninsured damages that may occur."
28. Sec. 8.6 *Waiver of Subrogation*. "The Authority and Master Concessionaire waive all rights against each other, and against any of their respective officers, employees, agents, successors and assigns and any other parties names as insureds or additional insureds in such policies, on account of any loss or damage caused by risks covered by insurance under this Article to the extent such party is covered by that insurance.
29. Sections 11 and 12 regarding Assignments. Although Assignment to another party requires agreement, the Authority can not unreasonably deny the Concessionaire's request to assign its rights under the Agreement. Upon

- assignment, the Authority shall release the Concessionaire's obligations under the Agreement.
30. Sec 12.2. The Concessionaire shall have the right to subcontract all or a portion of its rights and duties under this Agreement to any Facility Operator.
 31. Sec. 13.2. If the Concessionaire defaults, the Authority can only sue for actual damages and not consequential or punitive damages.
 32. Sec.13.5. The Concessionaire can sue for any and all remedies available at law or in equity, including enforce its rights under the Remainder Agreement and cause the City to take possession of the Premises so as to terminate the Authority's interests in the Premises and the Facility.
 33. Sec. 15. The Authority shall not sell the Premises or any interest in the Premises without giving the Concessionaire the first right to purchase the property.
 34. Sec. 16. The Authority agrees that any freight handling or storage Port Facility, intermodal rail loading and unloading facility, truck loading terminal, or other comparable transportation facility located in Wayne County under the control, authority or supervision of the Port Authority will, at the election of the Master Concessionaire, be subject to the terms and provisions of this Master Concession Agreement and incorporated into the Facility.
 35. Sec. 18.10(e) If the parties are unable to resolve their disputes within 30 days, either Party may initiate litigation. The exclusive venues are the Circuit Court for the **County of Macomb** and the Federal District Court for the Eastern District of Michigan.
 36. Sec. 18.12 *Perpetuities Savings Clause*. If any provision is invalid due to the rule against perpetuities, the Agreement shall last until the twenty-first anniversary of the death of the last survivor of the descendants of Joseph P. Kennedy, father of President John F. Kennedy.
 37. Sec. 18.13 Expenses of Enforcement. The losing party in litigation shall pay all attorney fees and actual expense incurred by the winning party.

The fundamental purpose of governing bodies such as a city or county or state creating new or expanding governmental agencies, is to benefit the public. The public non-profit corporations, like the Detroit/Wayne County Port Authority is bound to that standard, even in public/private agreements. Section 2.5, which is item 20 listed above, potentially conflicts with that mandate. Giving a "preference" to private enterprises, especially future sight-unseen proposals may run afoul of the equal protection provision of the U.S. Constitution, Fifth Amendment, Takings Clause.

In fact, the entire flavor of this Master Concession Agreement gives "preference" to one business entity for the benefit of paying off the \$2 million bonds. It also appears to render the Detroit/Wayne County Port Authority nearly constructively powerless to independently exercise its legal rights, duties and privileges. Section 4.4 (item 23 above) could relinquish control over the Authority's options to finance current and future debts. The Concessionaire could build a bridge then bill the Authority.

Several legal issues are addressed below as they relate to the Agreement.

Standards of Conduct and Ethics for Public Officers and Employees

MCL 15.341 et al. at Section 2 (3) requires a public officer to use personnel resources, property, and funds under the officer or employee's official care and control judiciously and solely in accordance with prescribed constitutional, statutory, and regulatory procedures. It also at (6) prohibits a public officer from rendering services for a private or public service that is incompatible or in conflict with the discharge of the officer's official duties or when that employment may tend to impair his or her independence of judgment or action in the performance of official duties. In applying the above to the actions of the Authority to waive statutory rights and causes of action, would have a chilling effect on performing that public officer's duties independent of the Ambassador Port Company's interest.

Good Faith and Care by Directors and Officers of Nonprofit Corporations

Similarly, under the Nonprofit Corporation Act at MCL 450.2541, directors and officers are required to discharge their duties of that position in good faith and with that degree of diligence, care, and skill which an ordinary prudent person would exercise under similar circumstances. There are elements in the Agreement that would question whether the Board of Directors of the Authority fulfilled their duty under the law. Of course, this is a question of fact, and it alone, does not mandate that a contract be voided.

U.S. Constitution, Amendment XIV and 42 U.S.C.S. Sec. 1983 Equal Protection

This U.S. Constitutional provision generally protects those persons similarly situated who have a protected right that a public entity has deprived them of. It has a three-step process in making such a determination:

1. State action
2. Existence of a protected property right
3. Arbitrary or irrational deprivation of that interest

Obviously, without the full facts it would be difficult to know if this provision was violated by the Agreement. There is a basis for concern if the Ambassador Port Company is receiving a benefit or preference to other person's detriment and if the Authority did not act rationally in the Agreement terms.

Eminent Domain and Condemnation

In *Shizas v City of Detroit*, 333 Mich 44 (1952), the limit to the sovereign's prerogative to exercise its powers of condemnation based on eminent domain is that "private property may not be taken for other than public use." The court added that if private property is taken for public use, there must be just compensation. If private property is taken for private use, the property owner must consent. The Michigan Supreme Court case involved a dispute over whether the property bounded by Monroe, Bates and Farmer

streets could be condemned (taking private property) to build a city parking garage with up to 25% of the floor space to be leased by private retail businesses for the benefit of added revenue. In its analysis of, private use, it stated:

Where, however, the intention to confer a private use or benefit forms *the purpose, or a part of the purpose*, of the proceeding or taking, the power of eminent domain may not be exercised.

The Court ruled that the City could not take the private property for the private use of having leases for retail businesses. The general rule applied was:

A statute authorizing a taking of private property for uses partly public and partly private is void, where the private use is so combined with the public use that the 2 cannot be separated.

In the recent Michigan Supreme Court case of *County of Wayne v Hathcock*, 471 Mich 445 (2004):

The transfer of condemned property to a private entity, seen through the eyes of an individual sophisticated in the law at the time of ratification of Michigan's 1963 Constitution, is appropriate in one of three contexts: (1) where public necessity of the extreme sort requires collective action; (2) where the property remains subject to public oversight after transfer to a private entity; and (3) where the property is selected because of facts of independent public significance, rather than the interests of the private entity to which the property is eventually transferred.

No one sophisticated in the law at the 1963 Michigan Constitution's ratification would have understood "public use" to permit the condemnation of properties for the construction of a business and technology park owned by private entities. Therefore, such condemnations are unconstitutional under Mich. Const. art. 10, § 2.

Every business, every productive unit in society, contributes in some way to the commonweal. To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health would render impotent Michigan's constitutional limitations on the government's power of eminent domain.

The Master Concession Agreement, which was entered into by the Port Authority, a public corporation, whose officers and employees are considered public servants, has so intertwined the private purpose of the Ambassador Port Company, a private corporation, as to provoke a possible violation of the Fourteenth Amendment of the U.S. Constitution, and Article 10 Section 2 of the Michigan Constitution (1963). If the same result were

applied as in the *Shizas* case, which was cited in the *Hathcock* case, the Agreement would be void.

One of the most troubling sides of the Agreement is the extensive degree of control the Ambassador Port Company has over the Authority's powers. Again, as illustrated in Section 4.5 (item 24 above), the Authority would be restricted in creating the finance package and real estate holdings as dictated by this Agreement (and the Ambassador Port Company). Even though the Ambassador Port Company owns the monetary benefits of the property, the tax-exempt status can enhance the profit margin. That tax advantage could conceivably be achieved though Sec. 4.6, if the Ambassador Port Company decides to transfer "any additional real property" to the Facility, with the right of reversion.

As a result the Agreement making part of its purpose to include private purposes, there is a mixture of purpose that could render certain powers granted to the Ambassador Port Company unconstitutional if implemented.

The Shipping Act of 1984 as modified by the Ocean Shipping Reform Act of 1998, has some jurisdiction over the port authority.

In Sec. 2(1) *Declaration of Policy*, the purpose of the act includes establishing "a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States..." The regulatory agency is the Federal Maritime Commission. The jurisdiction of the Act at Section 4(b), includes "Marine terminal operators and certain agreements that:

1. Discuss, fix, or regulate rates or other conditions of service; or
2. Engage in exclusive, preferential, or cooperative working arrangements, to the extent that such agreements involve ocean transportation in the foreign commerce of the United States.

Prohibited acts under Section 10(d)(4)...Marine Terminal Operators includes:

- (4) No marine terminal operator may give **any undue or unreasonable** preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person. (Emphasis added.)

If the parties to the Agreement violated the above provision, the Commission can seek injunctive relief in a district court of the United States. Any person can file a complaint. The Agreement in general, when taken as a whole gives a preference to the Concessionaire's business. This is further though indirectly implied, in Section 2.5. **Waiver of Conflict.** Said section has the Authority understanding and acknowledging that the Concessionaire wants to incorporate its businesses into the Facility for the purpose of profits to current and future businesses. The Authority further agreed that any preference the Concessionaire give to its own property over the Facility property can not be legally challenged by the Authority.

While the Authority may have waived its rights to sue, other persons who have standing are not precluded in claiming a breach of duty, should such preferential treatment be harmful to their interest.

Section 2.5 of the Agreement almost acknowledges the conflict of purposes between private profit and public purpose. When public property is used, it is to be used for a public purpose. Speculating on whether the parties would use public asset for anything else, at this point would be premature, but certainly bears watching.

Budgetary Authority

Legally, budget approval involving public funds and public property should be under the control of the legislative body. The Master Concession Agreement does require the Authorities' approval, which would technically, allow the Authority to exercise its rights. The question becomes, what if the Authority rejects the Concessionaire's requests. Then the Authority would have to prove that its denial was reasonable, while giving up claiming certain defenses to its actions. Furthermore, without the approval of the governing bodies, over some control over the expenditures so as not to spend more money than it has, prohibits the City from managing its affairs under the Michigan Constitution as discussed earlier in this memo under House Bill 5029.

Taxation

The Michigan Constitution Article IX *Finance and Taxation* has several sections that may be applicable. Sec. 18 State credit:

The credit of the state shall not be granted to, nor aid of any person, association or corporation, public or private, except as authorized in this constitution.

The Agreement not only appears to give a preference to the Ambassador Port Company, but also could be perceived as giving them credit in that advantage.

Tax-Exempt Status as a "Concessionaire"

The Authority and Ambassador Port Company have made it clear in their Agreement that they need to retain a tax-exempt status in their expansion endeavors in order to be successful and profitable. There are various ways that can be achieved, most notably in the MCL 211.181 *Taxation of lessees or users of tax-exempt property; exceptions*:

Sec. 1. (1) Except as provided in this section, if real property exempt for any reason from ad valorem property taxation is leased, loaned, or otherwise made available to and used by a private individual, association, or corporation in connection with a business conducted for profit, the lessee or user of the real property is subject to taxation in the same amount

and to the same extent as though the lessee or used owned the real property.

(2) Subsection (1) does not apply to all of the following:

...(b) Property that is used as a **concession** at a public airport, park, market, or similar property and that it is available for use by the general public.

...(e) Real property located in a renaissance zone to the extent and for the duration provided pursuant to the Michigan renaissance zone act, Act. No. 376 of Public Acts of 1996, being sections 125.2681 to 125.2696 of the Michigan Compiled Laws...(Emphasis added.)

In a recent Michigan Court of Appeals case, *Service System Asso v City of Royal Oak*, 2005 Mich App Lexis 3044, decided December 6, 2005, in which a for-profit corporation provided food and catering services to the general public at the Detroit Zoological Park, "concession" was defined as:

To be a concession, the operation should be a "subsidiary business incidentally related to a public-oriented operation, rather than a privatized, self-contained operation."

The Court cited *Seymour v Dalton Twp*, 177 Mich. App. 403 (1989) where a concession was not found to exist because:

"Conspicuously absent" from the agreement were provisions characteristic of a concession, such as minimum hours, standards of service or oversight of operations by the city. This Court stated that the petitioner "had an unacceptable degree of discretion to run the gold course and related facilities as he saw fit, without the imposition of obligations directed toward the fulfillment of a public purpose."

The Ambassador Port Company appears to have received most of the powers and authority that the Port Authority, which is not characteristic of a "concession."

Based on that definition, it could be possible that the Agreement has not created or granted a "concession," and therefore not entitled to tax exemption under that provision. Yet the Agreement also says that the Ambassador Port Company is not responsible for taxes. If they are, the Authority may have gone beyond its authority in that regard. If they are required to pay taxes and don't under the Agreement, who pays? Certainly the Authority is not likely to have the authority to pay the Ambassador Port Company's taxes.

Other Tax Advantages

Section 8 (O) and (P) of H.B. 5029 provided for other finance and tax advantages by receiving the same rights, privileges, and powers granted an Authority in the *Brownfield*

Redevelopment Act, 1996, MCL 125.2651 to 125.2672 and the *Local Development Financing Act*, 1986 PA 281, MCL 125.2151 to 125.2174. This means that they can contract with other governmental entities to achieve their purposes. These public corporation financial and tax advantages could be used to compete against other for-profit enterprises that ~~want~~ may want to build a bridge or other economic development project. Again, if there is a commingling of public and private purpose, that reduced or tax exempt advantage could be jeopardized.

Preference and Prohibition against Competition

The Agreement when added to the proposed H.B. 5029 that limits the number of port authorities within a county and city, could effectively lock out and prevent the City of Detroit from establishing any additional Port Authorities for a public purpose, which the City currently has the right to do. This could bring into violation 12 USC 2, **Commerce and Trade, Chapter Monopolies and Combinations in Restraint of Trade**, which prohibits:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations...

Open Meetings Act

The Open Meetings Act at:

MCL 15.263(2) All decisions of a public body shall be made at a meeting open to the public. (3) All deliberations of a public body constituting a quorum of its members shall take place at a meeting open to the public.

The Master Concession Agreement copy that RAD received is marked "confidential" on every page. If the decision by the Authority to select the Ambassador Port Authority as well as, the decision to enter into the Agreement, was no done in an open meeting, there may be violation of that Act. RAD is primarily mentioning this because of informal verbal inquiries as to when was the Agreement signed.

Public Policy Concerns

There may be other concerns that are "legal" but may be a public policy issue. For example, the Agreement states at Section 18.10 (e):

Each Party agrees to submit to the personal jurisdiction of the Federal District Court for the Eastern District of Michigan and/or the Circuit Court for the **County of Macomb.**" (Emphasis added.)

The Authority has agreed not to file in the Circuit Court for the County of Wayne.

Scope of Authority of the Port Authority

Did the Authority have the authority under the present State law and City's actions? Two documents were referenced in the Master Concession Agreement, 1. The "Remainder Agreement" allegedly signed between the City and the Master Concessionaire, and 2. the "Development Plan." Those documents may be critical in answering that question.

Your Honorable Body approved a resolution granting an assignment to the Detroit/Wayne Port Authority on May 6, 2005. See attached. The Authority can only do what it is authorized to do under existing law. Many of the applicable laws were discussed above in this memo. In addition to those laws, the Authority must also comply with the limitations from the resolution/assignment. The agreement transferred certain properties with certain stipulations and with the right of the City to get the property back if certain conditions are not followed.

It is possible that the Authority went beyond its Authority based on the resolution and the Agreement for the following reasons:

- A. The Authority expressed their desire to acquire a concessionaire to operate the facilities. However, they appear to have gone beyond the legal definition for a concession, possibly obtaining the property under false pretense.

"Whereas...the Authority desires to acquire the Leased Premises and the real and personal property... and to grant a **concession** to operate the Port Facility to a master concessionaire for the purpose of assisting the Authority with the operation of the Port Facility."
(Emphasis added.)

- B. The assignment of the property was based on there not being any costs to the City. The Authority entered into an Agreement with The Ambassador Port Company that could cost the City directly and indirectly, based on the added liabilities. The Authority was not authorized to create the liens and liabilities against the City that is in the Agreement.

Reso:

Whereas, in furtherance of the foregoing, an Assignment Agreement has been presented to the City Council for approval, to which the City will assign the Authority its right to obtain title to the Leased Premises upon payment of the bonds, **subject to the condition** that if the Leased Premises should ever cease to be used as a public port facility as that term is used in the Port Authority Act, then title to the Leased Premises shall vest in the City or such other public entity as the City may designate, **without cost to the City or its taxpayer, and free and clear of any debts, liens or encumbrances or other liabilities.** (Emphasis added.)

C. In the Assignment Agreement the City and Authority agreed to the following:

1. Property was transferred by quit-claim deed, subject to the condition that if the Leased Premises ceased to be used as a port authority, then the title shall vest in the City without cost to the City or its taxpayers, and free and clear of any debts, liens or encumbrances or other liabilities.
2. The Authority agreed, at its expense to finance and implement the Project.
3. The Authority agreed to pay to the City 40% of all net revenues it shall receive from the operation of the Leased Premises.
4. After transfer of the Leased Premises to the Authority, the Authority will be solely responsible for all costs incurred after such transfer associated with the development, maintenance, insurance, and operation of the Port Facility.
5. All instruments shall be conditioned upon and effective simultaneous with the Authority's entering into a binding concession agreement, the pay-off of the Bonds, the delivery of the quit-claim deed, and the execution and delivery of such other associated documents necessary to effectuate this Assignment Agreement.

Based on the terms of the Assignment agreement, the City is to incur no liability, but is to receive 40% of the net revenues from operation of the Leased Premises. Overall, the Authority did not appear to preserve the rights as it agreed to in the Assignment Agreement with the City.

It may be significant to know when and if all the documents required to be signed simultaneously occurred. And if not, there may also be an issue of validity and title ownership.

Summary

The Master Concession Agreement reviewed by RAD appears to have potential constitutional flaws. The Court is the final interpreter of the constitutions' application to State and local laws. It would be essential to gather all of the relevant facts, to determine the full extent of legal options. Many potential challenges to the Agreement are subject to the statutes of limitations, which vary depending on which law is at issue.

The Master Concession Agreement may have gone beyond the conditions of the City's assignment if it created additional costs, liens or liabilities for the City. The Master Concession Agreement may not be a "concession" at all with certain unintended tax consequences to the parties.

Absent all the relevant documents, RAD's analysis remains preliminary.

If you have further questions, please contact RAD.

Attachments